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In the Supreme Court of the United States

October Term, 1972

No. 72-425

DARYL L. McDONALD,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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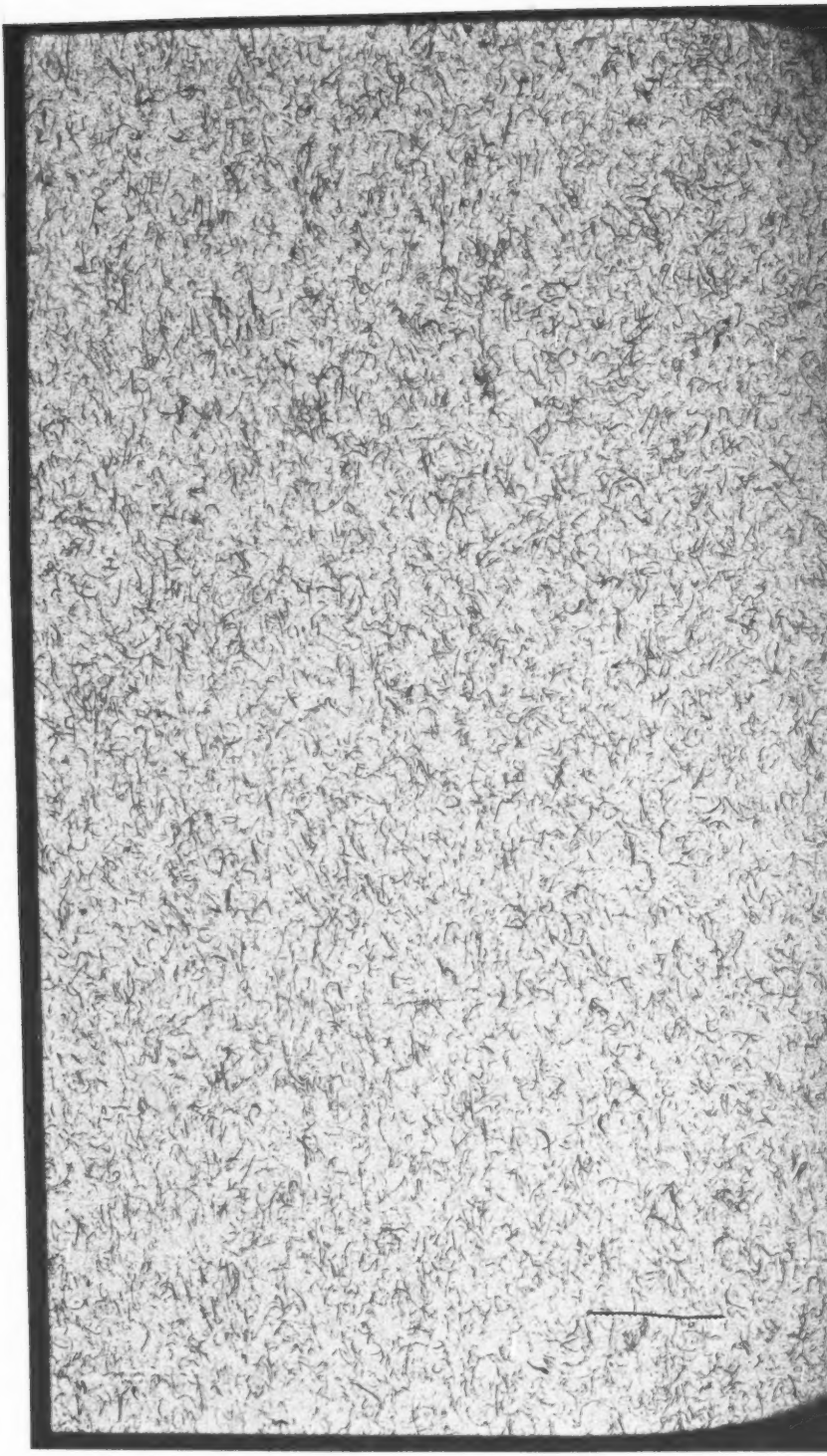

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STATEMENT OF ISSUES

I. Whether the Ohio drug laws as enacted and enforced violate petitioner's right to Due Process of Law and Equal Protection of the Laws as written in Amendment 14, United States Constitution.

II. Whether the Ohio drug laws as enforced by the Prosecuting Attorney of each county within the State constitute an abuse of discretion that violates petitioner's right to Due Process of Law and Equal Protection of the Laws as written in Amendment 14, United States Constitution.

III. Whether the statutory penalties for violation of the Ohio drug laws constitute a violation of the petitioner's right to be free from Cruel and Unusual Punishments as written in Amendment 8, United States Constitution.

IV. Whether petitioner was unlawfully entrapped by state officers in violation of petitioner's right to Due Process of Law, as written in Amendment 14, United States Constitution.

STATEMENT OF THE CASE

On January 9, 1970, police officers armed with a properly executed search warrant entered the home of one, Wayne Lehman. The officers involved were special detectives from the narcotics unit of the Akron Police Department. A thorough search of the premises uncovered only a single piece of incriminating evidence, a small hand-rolled marijuana cigarette that had been found in the breast pocket of a sports coat belonging to Lehman. The coat was found in the upstairs bedroom closet.

Thereafter, Lehman was arrested and advised of his rights as required by law. Lehman was transported to the central detective bureau where he agreed to cooperate with the investigating officers. At that time marijuana was classified as a narcotic drug and the possession of the drug was a felony carrying a penalty of from two to fifteen years plus a fine, Revised Code 3719.09. In exchange for information and cooperation from Lehman in their general investigation, the officers chose not to charge Lehman for the offense. Ohio has an immunity statute, Revised Code 3719.70, which grants immunity from prosecution to those persons who aid the police by supplying information or assistance in the investigation and control of illicit drug traffic.

When asked about his source of supply, Lehman produced two names, Robert Atwood, Lehman's brother-in-law, and a man known only to him (Lehman) as "Daryl."

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Lehman indicated that he had known Daryl while both had served in the military together. Lehman could not supply the officers with a last name for "Daryl." Daryl was known to the narcotics officers as Daryl McDonald whom the officers suspected of illegal drug dealings. The detectives produced a photograph of McDonald and Lehman identified him as the man he knew as "Daryl." Lehman told the police that he had never directly purchased drugs from McDonald, but that McDonald sold to Lehman's brother-in-law, Robert Atwood.

Lehman then agreed to attempt to purchase marijuana or hashish from McDonald with monies supplied by the police. Following his initial requests, Lehman was informed by McDonald that he (McDonald) had nothing to sell at the moment, but that McDonald was expecting a new shipment in the near future. Lehman again contacted McDonald and a meeting was arranged between the two of them for February 5, 1970 at a public tavern called Schroeder's Bar.

The first purchase occurred on that date. Lehman testified that he entered the bar and observed McDonald sitting alone in the fourth booth. They greeted each other and then walked outside. Lehman purchased five ounces of marijuana from McDonald for $75.00. Lehman paid $40.00 in cash which had been marked and supplied by the police; the remainder was to be paid a few days later. That rendezvous was set at another tavern, Bubba's Bar, where Lehman paid the $35.00 balance.

The second purchase occurred on March 2, 1970, almost a full month from the date of the original transaction. Again the two parties agreed to meet at Bubba's Bar. This time Lehman was accompanied by an undercover detective, Officer George Reuscher. When they arrived at the pre-

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arranged time, McDonald was not present so both men waited. A few minutes later McDonald telephoned Lehman at the bar and told him instead to meet him immediately at another bar, the Jednota Club. Both Lehman and Reuscher then proceeded to the Jednota Club address.

The three men then met at the Jednota Club while other officers waited outside. Inside, McDonald had conversations with both Lehman and Reuscher. McDonald explained the operation of his business to both men, especially Reuscher, and encouraged both men to operate as sellers for him in the future. Lehman then purchased an ounce of keeth, a form of hashish, for $150.00 from the petitioner. All of the bills used were marked with their serial numbers previously recorded. Upon leaving the bar, McDonald was arrested by the officers outside.

Petitioner was arrested and charged with two counts of unlawful sale of a narcotic drug, Revised Code 3719.20 (B). The first count arose out of the February 5 sale at Schroeder's Bar; the second count arose out of the March 2 sale at the Jednota Club. In addition, petitioner was charged with unlawful possession for sale of a narcotic drug, Revised Code 3719.20 (A), because he had in his possession a substantial quantity of keeth (in addition to that previously sold) at the moment of his arrest outside of the Jednota Club on March 2, 1970. Exactly one month later, April 2, 1970, McDonald was indicted on all three charges in a multi-count indictment.

Trial was begun on February 8, 1971. At that time the defendant, in addition to entry of a general plea of not guilty, moved for a directed verdict on the issue of entrapment as a matter of law. The trial court overruled the motion, yet agreed to submit the issue to the jury on its

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final instructions. Following deliberations, the jury returned a verdict of guilty as charged on all three counts. A motion for new trial was overruled and the petitioner was sentenced to thirty to sixty years. Both counts of sale of a narcotic were to be served concurrently (20-40), but the possession for sale count (10-20) was to be served consecutively with the two counts of unlawful sale.

Petitioner appealed his conviction solely on the issue of entrapment to the Court of Appeals, Ninth Judicial District, Ohio, which affirmed the conviction on February 9, 1972. McDonald then appealed to the Supreme Court of Ohio, this time again on the issue of entrapment and the limited issue of whether the intervening change in the statute voided the conviction. The Court affirmed without opinion on May 18, 1972. Petitioner applied for rehearing on his cause which was denied on June 15, 1972. A petition for writ of certiorari was filed with this Court on September 13, 1972. From that petition the respondent respectfully files this Brief in Opposition.

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ARGUMENT

PROPOSITION OF LAW NUMBER ONE

The Narcotic and Drug Laws of Ohio as lawfully enacted and enforced do NOT violate petitioner's right to Equal Protection of the laws within the meaning of the Fourteenth Amendment.

Petitioner alleges as his first assignment of error, essentially, a general objection to the Ohio laws as they refer to the sale of hallucinogens, specifically hashish. The law as presently amended defines hallucinogenic drugs as lysergic acid diethylamide, known as LSD, cannabis known as marijuana, and hashish. Revised Code 3719.40. The law also goes on to name several additional drugs. Sale of hashish is a violation of Revised Code 3719.44 (D) as amended March 18, 1969. Prior to that date hashish was considered a narcotic in Ohio and its sale was prohibited by Revised Code 3719.20 (B). That statute as amended became effective on September 16, 1955.

In this appeal, petitioner raises for the first time each issue present in his brief with the exception of the entrapment issue. At each stage of the case, McDonald, through his attorneys at no time posed any formal objection to the law or its penal application. For that reason, those issues (excepting entrapment) have never been timely raised. Normally, issues not raised at trial or on initial appeal cannot be later raised for the first time, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936). See also *State v. Lancaster*, 25 Ohio St. 2d 83 (1971) and *State v. Gordon*, 28 Ohio St. 2d 45 (1971). Consequently, the State of Ohio would move the Court to ignore those issues in the

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brief of petitioner because they have not been timely presented.

The State of Ohio would also draw the Court's attention to the obvious political nature of the present case. No doubt, the Court may take judicial notice that the drug laws of the several states, as well as the nation itself, represent a continuing political issue. The Court has expressed in the past that the determination of whether a statute has been duly enacted after sufficient study and debate by the legislative branch is a political question and not an issue which the Supreme Court will review. *Coleman v. Miller,* 307 U.S. 433 (1939). Similarly, the issue of the propriety of marijuana laws in general is, on its face, a political and non justiciable question which fails to meet any of the standards discussed by the Court in *Baker v. Carr,* 369 U.S. 186, 82 S. Ct. 691 (1962). The state enactment of laws relating to the use and sale of drugs hardly involves the breach of state police power or the violation of any fundamental federal right.

The regulation of drugs and medicines falls squarely within the lawful functions of the state police power. In *Spencer v. Sacks,* 173 Ohio St. 419, 183 N.E.2d 363 (1962), the Ohio Supreme Court declared that in the exercise of its police power a state may regulate the administration, sale, prescription, possession and use of narcotic drugs. The Ohio Court later went on to say that the state had the right to classify marijuana and hashish as a dangerous drug if it so desired.

State legislation enacted within the umbrella of the police powers is generally presumed to be constitutional. The burden rests on the petitioner to demonstrate that the Ohio law abridges a prescribed federal right. Substantive due process requires a reasonable basis for enactment.

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Surely the State has the right (if not the moral responsibility) to protect its citizens from the dangers of harmful drug traffic. The law itself is clearly founded on a valid state purpose. The means selected to accomplish that purpose, i. e., the criminal laws is also valid. Every jurisdiction has utilized its criminal laws as the major enforcement arm to accomplish those objectives.

Much of petitioner's argument deals with the drug classification itself. He presents the circular argument that, on one hand, to include marijuana and hashish with other drugs such as morphine and heroin in terms of identical penalty for sale of those substances is constitutionally impermissive. Yet he later argues that it is also constitutionally impermissive to have different penalties for sale of barbiturates or amphetamines as opposed to the penalty for sale of marijuana. Within certain limitations, the issue of penalty is a state function. This merely illustrates the quagmire that the Court will enter if it chooses to review each provision of a criminal statute which appears on its face to be valid. Penalty factors and their relationships to other crimes are considerations for the legislature at the time of enactment and it would be inadvisable for the Court to entertain that function. In addition, the Fourteen Amendment protects "persons" and not chemical substances. The word "persons" is specifically used in the language of the amendment. Comparisons with other drugs is a comparison between substances and not "persons" within the meaning of the amendment. It is only when those differences operate to create unreasonable and discriminatory results between classes of persons that the amendment becomes operative. Any difference in classification that does result is one that is based upon reason from contemporary scientific knowledge.

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Petitioner places great emphasis on the fact that recently several states have begun to seriously review their narcotic laws. That is a policy to be determined by each state within its sovereign powers. Merely because a few states choose to change their policy does not give birth to a new constitutional principle. The regulation of drugs is a sovereign decision for each state. Nothing requires that the Michigan laws on the subject be identical to the neighboring Ohio laws. If there is, in fact, a national priority that the drug laws in each state be uniform, then that is the jurisdiction of Congress to set that national policy.

The Court should take great care in this case to respect the constitutional separation of powers. The majority of petitioner's arguments deal with the general legislation of marijuana. These arguments are best directed to the legislative branch rather than to the attention of the Supreme Court of the United States under the guise of some heavily contrived constitutional doctrine.

PROPOSITION OF LAW NUMBER TWO

Any discretion exercised by the prosecutor is consistent with his professional duty and oath of office and not violative of any constitutional provision.

Petitioner maintains that the prosecutor has the right to pick and choose among a number of statutes regardless of the facts or circumstances of the criminal act charged. On the contrary, the prosecuting attorney is bound by statute and by the Canons of Professional Ethics to apply the law as drafted and intended by the Legislature.

Ohio maintains a comprehensive scheme to control illegal drug traffic within its borders. Each of these stat-

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utes is definite in its description and penalty of the criminal act. For example:

A. Revised Code 3719.101; Knowingly permitting the use of Dwelling house for the illegal keeping or dispensing of narcotic drugs.

B. Revised Code 3719.172; Illegal Possession of Instruments for Administering Drugs.

C. Revised Code 3719.41; Possession of an Hallucinogen.

D. Revised Code 3719.44 (B); Possess with the intent to sell any hallucinogen.

E. Revised Code 3719.44 (D); Sale of an Hallucinogen.

Each section defines a specific criminal act. Each section provides for a specific penalty, Revised Code 3719.99 et seq., separate and apart from any other crime charged.

The prosecuting attorney is the chief law enforcement officer of the county. Revised Code 309.01 provides:

> There shall be elected quadrennially in each county a prosecuting attorney who shall hold office for four years, beginning on the first Monday of January next after his election.

Revised Code 309.08 defines the powers and duties of the prosecuting attorney:

> The prosecuting attorney may inquire into the commission of crimes within the county and shall prosecute, on behalf of the State, all complaints, suits, and controversies in which the State is a party, and such other suits, matters, and controversies as he is required

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to prosecute within or outside the county in the probate court, court of common pleas, and courts of appeal.

Petitioner maintains that the prosecuting attorney arbitrarily and capriciously selected the charge to be placed against the defendant. No evidence of such abuse of office has ever been placed before this Court, nor has any such issue ever been raised either in the trial court, Court of Appeals, or the Supreme Court of Ohio.

McDonald sold what is presently defined as an hallucinogenic drug, Revised Code 3719.40, to an undercover agent. He was arrested, charged, and prosecuted for the illegal sale of that drug.

The selection as to whether to prosecute, and on what charge to prosecute is a duty and responsibility of public office. The Court must presume, absent any facts to the contrary, that "Official duty has been regularly performed." *People v. Gray*, 254 Cal. App. 2d 256, 63 Cal. Rptr. 211 (1967).

This Court has upheld the right of the prosecutor to select the crime to charge where the facts of the case are consistent with the elements of the crime charged. Justice Clark held in *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), that the decision to prosecute will not be overturned on grounds of equal protection absent a clear showing that the decision was based on race, religion, or other arbitrary classification. See also *Oregon v. Hicks*, 213 Or. 619, 325 P.2d 794 (1958).

The burden of showing an abuse of prosecutorial discretion rests with the defendant. The prosecutor is presumed to have acted lawfully in the performance of his office. In this case petitioner, through his attorneys, has

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only attempted to make bald allegations. Nothing alleged is at all supported by the record or by any means of documentation. The test has been previously determined by this Court in *Snowden v. Hughes*, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497, where the Court stated at page 8:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.

More directly in point is *Hutcherson v. United States*, 120 U.S. App. D.C. 274, 345 F.2d 964 (1965). Hutcherson had sought appeal on the basis that he should have been charged under the D. C. Code rather than his charge and resulting conviction under the Federal statute. He felt entitled to be charged under the D. C. Code because the penalty was less severe than that provided by the Federal statute. The conviction was affirmed on the basis that the defendant has no constitutional right to elect which of two applicable statutes shall be the basis of his indictment and prosecution.

Also applicable is *Deutsch v. Aderhold, Warden*, 80 F.2d 677 (5th Cir. 1935):

> The United States attorney of the district where a violation of a federal statute occurs, is charged with the duty of prosecution and vested with complete control over the proceedings, in the exercise of sound discretion. If the facts show a violation of two or more statutes, he may elect under which he will prosecute in the absence of a prohibitory statute

PROPOSITION OF LAW NUMBER THREE

The lawful penalties imposed for violation of the Ohio narcotic and drug statutes fail to meet any of the enumerated tests or standards to make the penalties in conflict with the Eighth Amendment, Cruel and Unusual Punishment Clause.

Petitioner alleges in his brief that the penalties imposed for violation of the Ohio narcotic drug laws, namely ten to twenty years for possession for sale and twenty to forty years for sale, are so disproportionate and excessive as to constitute cruel and unusual punishment within the purview of the Eighth Amendment. Such an argument by its very nature is necessarily subjective.

The Cruel and Unusual Punishment Clause is one which the Court has dealt with in the past. It is one which the Court has used quite sparingly throughout the course of our history. By its very nature the clause cannot be easily defined. One man's conception of what would constitute Cruel and Unusual Punishment will often differ from another's.

Under the concept of individual state sovereignty each state is free, within certain boundaries to fashion a scheme of punishments under its criminal laws. The penalties imposed by one state need not be exactly uniform in severity to that imposed by its sister states. The Court should not step in to create a scheme of National punishments merely because there is no absolute uniformity of punishments for similar offenses. Only where the punishment exceeds the boundaries of human reason should the Court intervene to restructure the penalties imposed by a particular test.

In *State v. Chaffin*, 30 Ohio St. 2d 13 (1972), the Ohio Supreme Court considered the same issue presently before this Court, that is, whether the penalties for violation of the drug statutes are unconscionably excessive. The Ohio court adopted the classical test most frequently used by this Court. The test applied was whether the penalty was so greatly disproportionate to the offense as to shock the sense of justice of the community.

> It is generally accepted that punishments which are prohibited by the Eighth Amendment are limited to torture or other barbarous punishments, degrading punishments unknown to common law, and punishments which are so disproportionate to the offense as to shock the moral sense of the community . . . Where the offense is slight, more may be prohibited than savage atrocities. However, the penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community.

See also *Kasper v. Brittain*, 245 F.2d 92 (1957), *State v. Juliano*, 24 Ohio St. 2d 117 (1970), *Weems v. U. S.*, 217 U.S. 371 (1910).

Petitioner in his brief substantially ignores this classical test. By his own admission every state in the Union plus the Federal statutes all prohibit the sale of dangerous drugs. Each of these jurisdictions provide a penalty for their violation.

Instead, petitioner relies mainly on the special doctrines implicit in *Furman v. Georgia*, 92 S. Ct. 2726 (1972), and *Robinson v. California*, 370 U.S. 660 (1962). Both of these cases can be distinguished for the purposes of the present case. In *Robinson*, the penalty was found to be cruel and unusual because it penalized a state of mind

and not an *act* as such. The penalty was felt to violate the philosophical concept of free will since Robinson was imprisoned for the *state of addiction*. He was not sentenced for possessing narcotics or for their sale. Under those circumstances a seemingly innocuous penalty could be considered impermissibly excessive. No such factors are present in McDonald's history. He was not an addict, and was indicted and convicted for sale of narcotics. It is important to note that where the illness or state of mind is no longer confined to the individual, but begins to affect the public order and tranquility the Court has declined to extend the *Robinson* rationale. See *Powell v. Texas*, 392 U.S. 514, 88 S. Ct. 2145 (1968).

In *Furman* the Court was dealing with a legal issue not analogous to the present one. Capital punishment represented a social issue that men have been weighing for centuries. It was an issue which was extensively researched and written about from all possible viewpoints. No such volume of opinions exists for the issue of marijuana. Only recently have the necessary medical research and study been applied to the issue. At the present time the empirical data seems inconclusive on the subject.

Furman also presented the added variable that the statutory penalties were not being uniformly applied within the State. The statistical differential between execution of blacks and minorities as opposed to whites was readily apparent. The penalty imposed for sale of narcotics in Ohio, on the other hand, has been uniformly applied to all those convicted under the statute. No invidious class discrimination is present in the enforcement of the statute. The only exception has occurred where the defendant was convicted of the lesser included offense of possession for purposes of sale which imposes the ten to twenty penalty.

Lastly, petitioner presents the novel proposition that the penalty has been substantially rejected by contemporary society (citing *Furman*). He reasons that the penalty is *per se* excessive because of the large volume of marijuana use in our society. The Court must not become confused by this reasoning. McDonald was not convicted because of his personal use, but because he sold the contraband article to a third party. Ohio provides for smaller penalties for personal use and has adopted the policy of utilizing stronger enforcement tools to prevent growing drug abuse through transfers and sales to others. Assuming that the law itself is justified, if the use of marijuana is as prevalent as petitioner suggests, then it is incumbent on the state to punish violations strongly and effectively to prevent the further spread of drug abuse.

Petitioner also cites California Proposition Number 19 (November 1972 referendum) as evidence that both the law and punishment are substantially rejected by contemporary society. As evidence of the attitude of its citizens, the Court should take judicial notice that that issue was defeated by a 2-1 majority by the electorate.

Petitioner also presents the theory that the penal purpose could be more effectively achieved through some less severe punishment. The facts of this case do not dictate such a conclusion. McDonald's crime was not the result of some social maladjustment. As a dealer in drugs, he was aware of the crime and its punishment. His crime was not the result of subtle, indirect environmental factors. Unlike *Robinson, supra,* or *Sherman, infra,* he was not motivated through illness or addiction to accomplish his crime. His sole motivation was the result of his desire to enter into a transaction for personal profit. His personal greed was the basis for his decision to engage in criminal

activity. Rehabilitation begins with punishment and the personal admission that one has engaged in criminal conduct. If Ohio and other states are prevented from imposing the punishments they feel necessary to combat the growing problem of drug abuse, then all of their other efforts such as public education; intrastate, interstate, and international enforcement; medical treatment for addicts, as well as the rehabilitation of the prisoner himself are all doomed to failure.

PROPOSITION OF LAW NUMBER FOUR

When government officers offer only the opportunity for the subject to commit a crime and the subject is so predisposed in his intent to commit the crime prior to the approach by law enforcement officers; the affirmative defense of entrapment is not established as a matter of law when the subject subsequently makes an illegal sale to a civilian informant in the presence of a police officer.

In the prosecution of drug related offenses it has been found that the use of a civilian informant is indispensable in dealing with the problems of drug abuse. This procedure of using informants is well accepted in our Ohio courts. Immunity from prosecution for the informant who cooperates with law enforcement officials is now provided in Revised Code Section 3719.70 for those persons who cooperate in gaining evidence.

Entrapment does constitute a valid defense to the crime where the evidence does show that the commission of the crime resulted from the "creative activity" of the police or the informant and not from the defendant himself. Where, however, the agents afford only the opportunity or facility for the commission of the offense, en-

trapment is not established as a matter of law. *Sherman v. U. S.*, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958).

Whether entrapment has occurred depends on the facts and circumstances of each particular case. The jury must weigh both the conduct of the police as against that of the defendant. Where the design to commit the offense is formulated in the mind of the accused, and not the police officers, entrapment is not established. The important element is to determine in whose mind the crime originated.

This issue was duly presented to the jury at trial by the judge. He instructed them as to the elements of entrapment and the various tests that have been formulated by the higher courts. In convicting the defendant the jury rejected the entrapment issue and by implication found the conduct of the investigating officers to be proper.

In addition, it is clearly proper for the officers to set a trap for the unwary criminal. As pointed out in the Opinion of the Court of Appeals, craft and trickery are available to the police where they merely afforded the opportunity, such as time, place, and marked money to commit the offense. *Sorrells v. U. S.*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932). Strong evidence does exist in the case to show that the appellant was not an "unwary innocent," but an "unwary criminal."

Since the federal courts first recognized the entrapment defense in *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915), the Justices and scholars have been deeply divided as to the appropriate standard to be applied to the alleged entrapment situation. To date basically three theories have been advanced to deal with the controversy.

The first represents the majority view in *Sorrells* and *Sherman* (Warren rule). This is the much discussed

"origin of intent" test which was applied by the lower courts in this case. Each court below felt that McDonald's conduct met the prerequisites of that test, i. e., predisposition of the defendant, etc. This is the view most favored by the bench, yet it is not without its critics. Its effect is to cause entrapment to become an affirmative defense that the defendant must himself establish.

The second represents the minority view in *Sorrells* and *Sherman* (Frankfurter-Roberts test). This test centers the inquiry on the conduct of the police and not the defendant. The examination is centered upon the alleged overreaching of the government officers. The basis of the theory is the proper use of government and official power. The Court looks at factors such as the conception, planning and execution of the act itself to see if it is the creation of the police and not the accused. This theory places an additional handicap on the prosecution. They are forced to affirmatively demonstrate that the intent originated from the accused conduct and not their own. Thus, where the police agent begins by a mere offer to buy, which is later acted upon after deliberation by the defendant, entrapment would be present just because the state was the initiator with a mere offer to buy.

The third, and least accepted view, seeks to balance the conduct and predispositions of both parties. This theory suffers from what would surely become a lack of uniformity that results whenever any balancing or equitable test is used. This is the view proposed by the drafters of the Model Penal Code, American Law Institute, Article 2, Section 2.13 (1962).

If the Court is to continue applying the Warren test, the judgment below should be affirmed. If the Court switches to the Roberts test, then arguably McDonald

would have been entrapped. This would be a disastrous blow to law enforcement. It would mean that they could never effectively initiate any investigation for violation of narcotic laws. Such a result would perpetuate and accelerate the growing problem of drug abuse in the nation. The adoption of the third theory would only operate to cause additional confusion. Because of the lack of clear standards, implicit in any balancing formula, law enforcement would never be certain as to whether an arrest is proper until after they make the arrest and it is adjudicated on the merits in the appellate courts. As such, the Court would be unable to direct the conduct of law enforcement on the streets at the time of the commission of the crime as it is presently able to do under the "origin of intent" test of *Sherman*.

Petitioner also proposes to the Court that the Fourth Amendment standards of Search and Seizure be applied to entrapment. Respondent fails to see the tenuous analogy between *Katz v. United States*, 389 U.S. 347 (1967) and *Terry v. Ohio*, 392 U.S. 1 (1968) and the present controversy over entrapment. Petitioner proposes that citizens have a fundamental right to unrestrictively engage in criminal conduct and that right is constitutionally protected. Any investigation, no matter how slight, conducted by government officials would be considered a breach of that right. Sale of narcotics should not be considered a basic right of privacy within the confines of one's home or apartment. Such a decision would be an unwarranted extension of the constitutional principles found in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

The Fourth Amendment concept of entrapment has been specifically rejected by the Federal courts in *United*

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States, ex rel. Hall v. Illinois, 329 F.2d 354 (7th Cir. 1964). Judge Hastings stated that entrapment is not a fundamental right embraced by the Fourteenth Amendment Due Process Clause. He rejected the attempt to analogize entrapment to the exclusionary rules concerning unlawful searches and seizures. The Court went on to say that:

> There is no showing here, and we believe there can be none, that the several states have not assiduously afforded an accused the unfettered protection of the defense of entrapment when the facts establish the coercive effect of the employment of the lawless enforcement of the law.

CONCLUSION

For these reasons a Writ of Certiorari should not be issued to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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